claim may perhaps be pleaded as a defense, even though the amount of such claim is not within the jurisdiction of the court. *Griswold* v. *Pieratt, supra.*

CRIMINAL LAW—BURDEN OF PROOF—REASONABLE DOUBT—INSANITY—CONTRADICTORY AND INCONSISTENT INSTRUCTIONS.—On a trial for murder the judge instructed the jury that after evidence of the insanity of the defendant had been produced "the prosecution must prove his sanity by a fair preponderance of credible evidence." Later in his charge the judge gave the instruction that "if you are not satisfied beyond a reasonable doubt that the defendant was sane" the verdict should be one of acquittal. *Held*, that these charges were not inconsistent and contradictory. *Egnor* v. *People* (1903), 175 N. Y. 419, 67 N. E. 906.

Upon the conclusion of the charge the defendant objected and asked for an instruction that the state must prove sanity beyond a reasonable doubt, whereupon the judge gave the following charge: "The duty is upon the people to satisfy you as to the sanity of the defendant by a preponderance of the evidence, but in considering that evidence if you have any reasonable doubt as to defendant's sanity he should be acquitted." It is well settled that inconsistent and contradictory instructions upon the same material point is ground for reversal. BLASHFIELD'S INSTRUCTIONS TO JURIES, § 73; ABBOTT'S CIVIL JURY TRIALS, p. 429; THOMPSON ON TRIALS, § 2326. But the question of difficulty is whether or not the rules laid down *are* inconsistent and contradictory. In this case the majority decided that the charges read together are clear and free from conflict. In the dissenting opinion Vann, J., says the jury "could not tell which rule was to guide them, nor whether there was any difference between a preponderance of evidence and proof beyond a reasonable doubt. In the same sentence they were given a wrong rule and a right rule, and they were free to follow either." It seems clear that two contradictory rules were here given upon the same material point, and the dissenting opinion appears to have the support of the great weight of authority. *People* v. *Valencia*, 43 Cal. 552; *Clare* v. *People*, 9 Colo. 122, 10 Pac. Rep. 799; *State* v. *Keasling*, 74 Iowa 528, 38 N. W. Rep. 397; *McDougall* v. *State*, 88 Ind. 24; *Howell* v. *State*, 61 Neb. 391, 85 N. W. Rep 289; *State* v. *Peel*, 23 Mon. 358, 59 Pac. Rep. 169; *State* v. *Singleton* (1903), — Kan. —, 74 Pac. Rep. 243; *Yerkes* v. *N. P. Ry. Co.*, 112 Wis. 184, 88 N. W. Rep. 33; *Morris* v. *Warlick* (1903), — Ga. —, 45 S. E. Rep. 407.

CRIMINAL LAW—EVIDENCE — COMPETENCY OF WIFE — MANNER OF SHOWING INCOMPETENCY—SUPPRESSION OF EVIDENCE.—In a prosecution for homicide defendant testified that he had married the chief witness for the state on the day before the trial. The state then called said witness over the objection of defendant, and asked her certain questions, to which objection was made on the ground that the witness was the wife of the defendant and therefore incompetent. Thereupon the court questioned the witness and upon her affirmance of the marriage excused her. *Held*, that it was prejudicial error to call the witness to the stand. *Moore* v. *State* (1903), Tex. Cr. App. — 75 S. W. Rep. 497.

The majority opinion is based upon the idea that the state's sole object in placing the witness on the stand was "to force the defendant to object to his wife's testifying against him in order to get the benefit of her testimony thus far in aid of the supposition and theory that defendant had married the witness to suppress her testimony." It does not appear that any evidence was offered except that of defendant, to prove the marriage, or that the defendant requested an examination of the witness on her voir dire. The majority of the

court seem to decide that it was incumbent upon the trial court to call for outside evidence of the marriage, as merely calling the witness to the stand, and thus compelling the defendant to object, was using the wife as a witness against her husband. This case seems to go much beyond any previous decision and there is much sound logic in the dissenting opinion of Henderson J., who says that only disqualifying facts were shown, and that this was not using the wife against the husband. No cases in point are cited in either opinion, and it is perhaps a case of first impression. For a general discussion of the time and mode of showing disqualification. See ROSCOE'S CR. EV., p. 141; TAYLOR ON EV. § 1393; JONES ON EV. § 796; THOMPSON ON TRIALS, § 364. See also *Seeley* v. *Engell*, 17 Barb. (N. Y.) 530; *LeBarron* v. *Redman*, 30 Me. 536.

In regard to competency of a wife to testify against her husband and his rights to suppress her testimony. See II MICH. LAW REV. 230.

DAMAGES—EXEMPLARY DAMAGES WHERE ACTUAL DAMAGE PURELY NOMINAL.—Plaintiff alleged that he had an arrangement with defendants, who were hotel keepers, for the use of a room in their hotel from time to time as he had occasion to occupy it, and had deposited a sum of money with defendants to be used in paying the rent of the room and for other purposes; that while this sum was unexhausted he applied for a room and was assigned one of which he took possession; that during his temporary absence from the room defendants locked it up with his wearing apparel and personal effects therein, and refused to allow him to re-enter or occupy that room or any other room in the hotel; that he was thus forcibly ejected from the room, in the presence of other persons, and thereby caused to suffer humiliation and loss of standing, reputation and credit. Plaintiff also alleged that defendants maliciously refused to return him, upon demand, the balance of his deposit. He sought in his pleadings to recover both actual and exemplary damages. He made no claim for the goods locked up in the room. The jury awarded him a verdict upon which judgment was rendered for the amount of the deposit unused and $200 exemplary damages. On appeal, *Held*, that the judgment could not be sustained. *Malin* v. *McCutcheon* (1903), — Tex. Civ. App. —, 76 S. W. Rep. 586.

The ground for reversal was that the facts alleged respecting the ejection from the room would not justify actual damages and the non-payment of the balance of the deposit would not sustain an award of exemplary damages. "It is well settled in this state," said the court, "that exemplary damages cannot in any case be recovered unless a right to actual damages is shown." "No judgment for exemplary damages may be allowed to stand unless some sum in actual damages is also found. *Carson* v. *Texas Inst. Co.* (Tex. Civ. App.) 34 S. W. 762; *Jones* v. *Matthews*, 75 Tex. 1, 12 S. W. 823. Where the actual damages are reduced by the proof to a mere nominal sum, there is generally no ground for the recovery of punitory damages. SUTHERLAND ON DAMAGES, Vol 1, p. 748." Without stopping to consider whether the court was right in holding that no ground for actual damages existed, the case is interesting for its contribution to the main question, upon which the authorities are in conflict. The chief authorities upon each side are collated in I MICHIGAN LAW REVIEW, 61, and a further reference to them is found in the same volume at page 515. The conclusion reached in the discussion referred to is against the position of the Texas cases.

DAMAGES—MEASURE OF RECOVERY FOR DEATH OF INFANT.—In an action by the father for damages for causing the death of his infant son, the lower